

Appl. No. 10/696,337
Amdt. dated May 6, 2005
Reply to Office action of Feb. 8, 2005

REMARKS

The Office Action dated February 8, 2005 has been carefully considered and certain clarifying amendments have been made to the specification and claims in a sincere effort to place the application in a proper form for allowance. Such action is respectfully requested on the basis of the following discussion.

THE SPECIFICATION

The paragraph appearing at page 6, lines 9-16 has been replaced with a new paragraph which clarifies and further defines the meaning of the phrase which describes that the groove bottom lies in a plane "substantially above" the plan of the bottom surface. Such phrase makes it clear that the groove bottom is at least 2 inches above the bottom surface. It also clarifies that in the preferred embodiment, the groove has a depth which is not greater than $1/5$ of a distance between said groove top and said bottom surface. For example, in the preferred embodiment if the groove bottom is located 2 inches above the bottom surface, the depth of the groove would be less than or equal to $1/2$ inch. If the groove bottom is located 4 inches above the bottom surface, the depth of the groove would be less than or equal to 1 inch.

In all cases, however, the groove bottom must be at least two inches or more above the bottom surface to be considered "substantially above" the plane of the bottom surface.

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THE CLAIMS

Independent claim 1 has been amended to clarify that said groove bottom is located at least two inches above the bottom surface.

Independent claims 7, 8 and 14 have each been amended to clarify that the groove has a depth which is not greater than $1/5$ of the distance between said groove top and said bottom surface and to clarify that said groove bottom is located at least two inches above the bottom surface.

Newly added claim 15 required the groove in claim 1 to have a depth which is not greater than $1/5$ of the distance between said groove top and said bottom surface.

Claims 5, 6 and 11 have been cancelled.

Claim 14 has been also been amended to provide a proper antecedent basis for all claim terms.

A new dependant claim 15 has been added.

INDEFINITENESS REJECTION OF CLAIM 14

Claim 14 has been amended to address the Examiner's 35 U.S.C. § 112 rejection regarding the need to provide a proper antecedent basis for "said rail members". Applicant thanks the Examiner for pointing out this error in original claim 14 and it is submitted that such error has been corrected. Allowance of amended claim 14 is requested.

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ANTICIPATION REJECTION OF CLAIMS BY SHAANON

Claims 1, 2, 8, 9 and 12-14 have been rejected under 35 U.S.C. § 102(b) as being anticipated by Shaanon et al., U.S. Patent 6,421,846. Shaanon et al. does at first appear to have some superficial similarities to Applicant's invention and the Examiner's description of Shaanon et al. is essentially correct with the exception of two very important features which are critical to Applicant's invention.

First, the Examiner incorrectly refers to Figure 8 of Shaanon et al. as showing "the inner wall portion having a groove 103 formed therein". A fair reading of Shaanon et al. and of Figure 8 thereof clearly shows that Shaanon et al. teach the placing of the groove 103 in the top of the track member and not in the inner wall portion as required by all of Applicant's claims. While it is true that Shaanon et al. suggest that "the rear lip 103a may be raised slightly in order to reduce the chances of the wall 18 popping out of the track in cold weather conditions (Col. 6, lines 11-13 - emphasis added), such teaching does not somehow turn the top of the track into an inner wall. Clearly if the rear lip 103a were not raised slightly, the groove would be place dead center into the top of the track. Merely raising the lip 103a slightly does not change such fact.

Claim 1 clearly requires a groove in an inner wall. Such feature is not taught nor suggested by Shaanon et al. Further,

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it is noted that claim 2 not only requires the groove to be in the inner wall but further requires the groove top to be provided at a location approximately halfway between said bottom surface and said top surface of said bottom track member. Such feature is neither taught nor suggested by Shaanon et al. either alone or in combination with any other reference cited.

Second, the Examiner incorrectly contends that Shaanon et al. teach the provision of a groove bottom which is "substantially elevated from the bottom surface." Shaanon et al. provide a blow molded hollow trapezoidal cross sectional track member which may be injected with a ballast such as concrete. Such a structure does, to a small degree, elevate the bottom of the groove above the bottom surface but does not "substantially" elevate the same. The concept that there might be some benefit by raising the side wall of the pool off the ground is not taught, suggested or even hinted at by Shaanon et al. Because Shaanon et al. do provide some small degree of pool wall elevation they do begin to provide a small degree of the benefits which Applicant now teaches. But only by appreciating the benefit and designing a pool which substantially elevates the pool wall will such benefits be fully achieved.

Because there is no mention of elevating the pool wall and no mention of any desired dimensions for the track member, one must carefully look to the Shaanon design to see what degree of

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elevation might inadvertently result from the hollow trapezoidal track member. For example the Shaanon et al. Figure 8 design has an inner wall which appears to slope outwardly at a rather shallow angle of approximate 40 to 50 degrees. To substantially elevate the groove bottom a much steeper angle would be desirable (unless enormously oversized components were utilized). For example, Applicant teaches a page 2, lines 16-19 of the Specification that the lower portion of the inner wall below the groove slopes outwardly at an angle of approximately 15 degrees.

Also by just looking at and comparing the width and depth of the groove 104 and the thickness of the track member wall of Shaanon et al., it is clear that there is no teaching or suggestion whatsoever of a structure which would elevate the groove bottom at least two inches above the bottom surface.

Each of the independent claims have been amended to specifically require the groove bottom to be elevated at least two inches above the bottom surface. Such a limitation avoids any possible ambiguity which may have existed with the prior requirement that the groove bottom be substantially elevated.

In addition to this new limitation, independent claims 7, 8, and 14 and newly added dependent claim 15 each now also require that the groove has a depth which is not greater than $1/5$ of a distance between said groove top and said bottom surface. Support for such a limitation is found in the original

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specification at page 6, lines 9-16 which has been clarified with new paragraph 6-9. More specifically a groove depth of less than 1/2 inch is required when the groove bottom is 2 inches above the bottom surface, thus the groove has a depth not greater than 1/5 of the distance between said groove top and said bottom surface.

By way of comparison, the depth of the groove in Shaanon et al. has a depth which is at about 1/4 of the distance between said groove top (the lip which is not slightly raised) and the bottom surface (i.e. the groove has a depth greater than 1/5 such distance). Such limitation is, in essence, just another way to show that the groove of the present invention is substantially elevated.

In view of the foregoing it is respectfully submitted that each of claims 1, 2, 8, 9 and 12-14, as amended, are now in a proper form for allowance.

ANTICIPATION REJECTION OF CLAIMS BY GERSHMAN

Claims 1, 8, 9 and 12-14 have also been rejected under 35 U.S.C. § 102(b) as being anticipated by Gershman, U.S. Patent 3,280,408. The Examiner's contentions with respect to Gershman are completely erroneous. Gershman teaches a structure essentially similar to the prior art shown in Figs 1 and 2 of the Applicant's specification. Gershman basically teaches the provision of a support panel 8 (pool wall) and vertical support

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members 48 which each bear against the upper surface of the lower wall portions 20 of adjacent lower support members 14. (See col. 4, lines 31-38, for example) The pool wall 8 is elevated only by the thickness of the lower wall portion 20 as is clearly shown in Figure 1.

In Gershman, the top 22 has a groove in it not the inner wall 16. Further the groove bottom is virtually (a sheet metal thickness away) of being at the supporting surface for the track bottom 20. This reference is not even close to Applicant's invention and provides no teaching or suggestion whatsoever of substantially elevating the side wall of the pool.

Gershman does suggest the specific features mentioned by the Examiner with respect to claims 9, 12 and 13 but the Examiner's contentions with respect to claim 14 is clearly in error.

OBVIOUSNESS REJECTIONS

The Examiner has also 3-6, 10 and 11 under 35 U.S.C. 103 as being unpatentable over Shaanon et al. or Gershman and claim 7 as being unpatentable over Shaanon et al. Such contention is without merit. Not only is there no anticipation of Applicant's claims by either of the cited references but further the combined teaching of such references do no render Applicant's claimed invention obvious.

As stated by the Court of Appeals for the Federal Circuit,

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in ACS Hospital Systems, Inc. v. Montefiore Hospital et al., 732

F.2d 1572, 221 U.S.P.Q. 929 at 933 (Fed. Cir. 1984) it is well established that:

"Obviousness cannot be established by combining the teaching of the prior art to produce the claimed invention, absent some teaching or suggestion supporting the combination. Under Section 103, teachings of references can be combined only if there is some suggestion of the incentive to do so".

The only possible reason to combine the teachings of the references and to incorporate the features and elements of Applicant's invention in the Final Rejection of these claims results from using teachings gleaned only from applicant's disclosure, which is the application of impermissible hindsight. As stated in W. L. Gore and Associates, Inc. v. Garlock, Inc., 721 F.2d 1540, 200 U.S.P.Q. 303 (Fed. Cir. 1983):

"[t]o imbue one of ordinary skill in the art with knowledge of the invention in suit, when no prior art reference or references of record convey or suggest that knowledge, is to fall victim to the insidious effect of a hindsight syndrome wherein that which only the inventor taught is used against its teacher".

The Examiner asserts that it would be obvious to select certain dimensions to optimize the performance of an above ground pool. The only problem is that the only suggestion of any reason or benefit whatsoever for substantially elevating the groove base comes from Applicant so one skilled in the art would have no knowledge or reason to "optimize" dimensions in a manner first and only taught by Applicant.

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It is submitted that providing taller track members so that the groove bottom can be substantially elevated is, from a design perspective, counter intuitive. Taller track members are inherently more top heavy and more likely to tip over and require significantly greater strength to effectively support the bottom pool wall at a higher elevation. It is submitted that an optimal design is one which provides a low profile track member close to the ground as taught by both Shaanon and Gershman. Shaanon even fills the track with concrete to provide greater strength and stability. Why would a designer take a stable design and make it less stable by elevating the pool walls? The answer is that they would not do so unless there was some suggestion to do so (which there is not) or unless they appreciated the benefits of raising the pool wall far above the ground (as is first taught by Applicant).

With respect to claim 7 the Examiner contend that Shaanon teaches that the lower portion of the inner surface of the track member slopes outwardly and that the choice of angle would have been obvious to one of skill in the art. As mentioned above, Shaanon shows an angle which appears to slope outwardly at a shallow angle in the 40 to 50 degree range. To change this angle to a very steep 15 degree angle again would be contrary to known design principals which one would normally consider in designing a stable base. The only reason for provide such a steep angle is

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to substantially elevate the groove bottom. Since there is no teaching or suggestion in the art for the benefits of such a feature there would be no reason or incentive for any designer to even consider selecting an angle which would make the track member more top heavy and unstable as compared to the actual teaching of Shaanon. Thus, the Examiner's position is without merit.

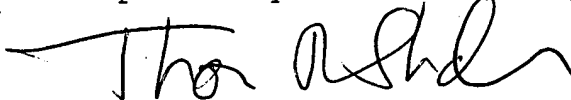
With respect to the Examiner's contention with respect to Applicant's claimed invention being obvious over Gershman it is submitted that such position is clearly without merit for the same reasons set forth above regarding the § 102 Gershman rejections.

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CONCLUSION

In view of the foregoing, it is respectfully submitted that the present application and each of claims 1-4, 7-10 and 12-15 are now in a proper form for allowance. Such action is requested at an early date.

Respectfully submitted,



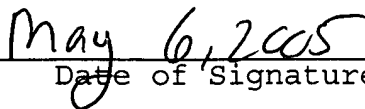
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